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No. 07-581

IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,
Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF RESPONDENTS

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INTEREST AND CONCERN OF THE *AMICUS*[1]

The National Academy of Arbitrators was founded in 1947 "to foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis," to adopt and secure adherence to canons of professional ethics, and to promote the study and understanding of the arbitration of industrial disputes. GLADYS GRUENBERG, JOYCE NAJITA & DENNIS NOLAN, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 26 (1997). As the historians of the Academy observe, the Academy has been "a primary force in shaping American labor arbitration." *Id.*

The Academy's stringent rules assure that only the most active, ethical, and well-respected practitioners are elected to membership along with scholars specially selected for significant contributions to the understanding of labor law and labor relations. Members are prohibited from serving as advocates or consultants in labor relations, from being associated with firms that perform those functions, and from serving as expert witnesses on behalf of labor or management. Currently, the Academy has approximately 650 U.S. and Canadian members.

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[1] Rule 37.6 statement: Counsel of record is the sole author of this brief. No person or entity other than the **National Academy of Arbitrators** has made any monetary contribution to the preparation or submission of this brief. Letters reflecting the consent of the parties to the filing of this brief have been filed with the Clerk.

The traditional function of labor arbitration was to resolve disputes between management and labor primarily involving questions of interpretation and application of the terms of collective bargaining agreements—grievance arbitration. Arbitration of disputes as to the application and interpretation of statutes protecting individual employees against specified forms of employment discrimination has not been a traditional function of labor arbitration. Recognizing that such a form of arbitration was becoming a part of the American landscape, the Academy was a prime mover in what was to become the 1995 multi-partite *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*. The Academy also amended its constitution and by-laws to encompass study and educational activity with respect to employment arbitration. Although it has continued to limit its membership primarily to those accomplished in traditional labor arbitration, its membership does include some who also serve as employment arbitrators.

In keeping with its educational mission, the Academy has appeared before this Court as *amicus curiae* in cases concerning the law of arbitration under collective agreements, *i.e.*, labor arbitration, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), and *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), in cases concerning the emerging law of the arbitration of individual statutory claims, *i.e.*, employment arbitration, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and, in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), where the two might conflate. In that case,

the Court chose "not [to] reach the question" presented here. *Id.* at 82.

The Academy believes it is specially situated to advise the Court in this case. The Academy's expertise provides the Court a deep understanding of how individual statutory claims relate to the system of industrial self-government of which labor arbitration is so integral a part.

It may appear odd that an association of professional labor arbitrators is advancing a position that would restrict the role of labor arbitration. The seeming oddity evaporates once the Court understands that the Academy's position is grounded in its fundamental educational mission: to bring to bear its experience and considered judgment to the question of what best comports with the nation's system of industrial self-government and of how individual civil rights in employment are best protected.

STATEMENT OF THE CASE

Amicus NAA defers to the Respondents' Statement of the Case[2] but it wishes to draw the Court's attention to three aspects of the instant collective bargaining agreement that play a critical role. First are the Grievance-Arbitration provisions of Arts. V and VI. As a matter of industrial practice, these are in all important respects routine. Art. V sets out the various steps through which a grievance proceeds in an effort at resolution between the union and management short of arbitration, including a contractual statute of limitations. Art. VI governs the submission to arbitration of disputes "between the parties" to the collective agreement. Consistent with the practice and philosophy of collective bargaining, under Art. VI the union and only the union controls whether or not a grievance will proceed to arbitration. THE COMMON LAW OF THE WORKPLACE § 1.29 (Theodore J. St. Antoine ed., 2d ed. 2005); ELKOURI & ELKOURI, HOW ARBITRATION

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[2] The Petitioners have asserted that, under the instant grievance procedure, "the Union permits the employee to pursue the discrimination claims in the arbitration forum with his or her attorney." Petition for Certiorari at 5. The record does not substantiate the use of the present indicative "permits." The collective agreement makes no provision for the individual to proceed to arbitration independent of the union. In this case, the union "consented" on an *ad hoc* basis to the plaintiffs' "use" of the Office of Contract Arbitration (OCA) created under the collective bargaining agreement to hear their age discrimination claim so long as the plaintiffs bore the cost. Pet. App. 42a. That *ad hoc* decision made labor arbitration "available" to these employees. Brief for the Petitioners at 16. But the union was not obligated to allow it. Indeed, the Petitioners recognize as much in their treatment of the avenues of redress available to the employee whose civil rights claims the union declines to pursue. *Id.* at 41–43.

WORKS 243 (Alan Ruben ed., 6th ed. 2003). In labor parlance, "'The grievance belongs to the union.'" Clyde Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 453, 487 (2001). A collective agreement could grant employees the right to proceed to arbitration independent of the union, *id.*; but such provisions are extremely rare in the private sector, if they exist at all, and this collective agreement makes no such provision.[3]

Second is the non-discrimination article set out in the Brief for the Petitioners at 5–6. Collective agreements often prohibit discrimination on one or more invidious grounds, but this collective agreement's non-discrimination provision is, in *amicus* NAA's experience, unique. Not only does it enumerate the federal and state labor protective laws it specifically sweeps in, it provides that: "All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the *sole and exclusive* remedy for violations." *Id.* at 6 (emphasis added). The Petitioners argue that "this language" was "specifically crafted" as clearly and unmistakably to preclude de novo judicial access for those statutory claims. *Id.* No reason appears to question this assertion, but the record is silent regarding the provision's bargaining history.

Third is the agreement's treatment of subcontracting. The last major survey of the contents of collective agreements by subject matter, unfortunately now of some vintage, found that about 58% of collective agreements in non-manufacturing dealt with subcontracting: for the most part by

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[3] *Supra* note 2.

reserving it for future bargaining, by prohibiting it if layoffs would result, by allowing it only where bargaining unit employees with necessary skills or equipment were not available, or by requiring adherence to past subcontracting practices. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 80 (14th ed. 1995). Art. 54 of this collective agreement contains an absolute prohibition: "There shall be no subcontracting of bargaining unit work during the term of this Agreement." Joint App. Before the Court of Appeals at A215. This provision bears on the analysis in Section I of the Argument, *infra*.

SUMMARY OF ARGUMENT

In *Wright v. Universal Maritime Service Corp.*, *supra*, this Court expressly reserved on whether subsuming civil rights claims into a collective bargaining agreement's grievance-arbitration procedure would preclude access to the courts de novo. *Id.* at 82. That question is presented here.

Amicus NAA submits two propositions to be dispositive. First, the doubt this Court expressed over thirty years ago that statutory civil rights would be protected adequately by mapping them on to the grievance procedures of collective bargaining agreements continues to be well founded. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 (1974). That skepticism is unaffected by the Court's allowance, subsequent to *Gardner-Denver*, of employment arbitration to substitute for civil litigation. Subsuming civil rights for preclusive disposition by a collective agreement's grievance procedure places the vindication of those rights in the hands of the union, subject only to its duty of fair representation. But a union's adherence to a duty of fair representation in deciding not to pursue an employee's civil rights claim is no substitute for an adjudication on the merits of the claim: the vindication of a minority's statutory civil rights should not depend on the dispensation of any majority however well intentioned it might be.

Second, *Gardner-Denver*'s allowance of two separate tracks for the vindication of workplace rights has not proven burdensome. If a collective agreement contains an applicable non-discrimination clause, its administration by the union up to and including non-preclusive arbitration provides a cost-

effective system for resolving the vast majority of civil rights claims without sacrificing those few whose claims are arbitrated by their unions negligently or not arbitrated at all.

ARGUMENT

INTRODUCTORY

At first blush, the current state of the law would seem to be anomalous: an unrepresented employee is deemed capable freely to consent to a contract of employment, albeit a contract of adhesion, pursuant to which her statutory civil rights are to be decided definitively by an employment arbitrator instead of a court (where state law would allow such agreement to be enforced[4]), but a union is not free to agree to have the same rights definitively resolved in labor arbitration as the product not of a unilateral managerial fiat but of an arms-length bargain. Consequently, the Court in *Wright v. Universal Maritime Service Corp.*, *supra*, perceived there to be two bodies of law in "tension" with one another—one generated under the Federal Arbitration Act (FAA), the other generated under the National Labor Relations Act. *Id.* at 76. The Petitioners say as much. Brief for the Petitioners at 30–31.

The anomaly is only seeming. The apparent "tension" disappears once it is understood that what is presented are two entirely different systems. The Court is *not* being asked in this case to sanction the submission of civil rights claims exclusively to arbitration under a collective bargaining agreement. The Court is being asked to sanction the submission of those claims exclusively to a collective agreement's grievance procedure that may *not* result in arbitration. Accordingly, it would assist the Court

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[4] *See* Steven Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability and Agreements to Arbitrate*, 2006 J. DISPUTE RES. 469 (reviewing state decisional law).

briefly to lay out the underpinnings of the two different systems the Petitioners are asking the Court to conflate.

Labor arbitration is the product of the system of collective bargaining, erected on the statutory foundation of the Wagner Act of 1935, that grew to maturity in the post-War period. In the 1940s and 1950s, as in the 1930s, there were few statutory workplace rights: the common assumption was that workers were entitled only to those rights that unions were able to secure for them.

How to police the parties' self-adopted obligations presented a major legal and societal question. Unions had long tended to eschew the courts, which they distrusted, in preference to self-help; but the strike is a blunt and often awkward instrument and certainly not one to be resorted to frequently or over minor disputes. During the war, management and labor had grown accustomed to dispute resolution by arbitrators, at the behest of the War Labor Board. But even after the war, so experienced a labor umpire as Harry Shulman argued that the law's approach to labor arbitration—premised as "an integral part of the system of self-government"—should be hands off. Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955). The Court accepted Shulman's premise, but instead shaped the law to conform to it.

In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Court held a collective agreement's commitment to grievance arbitration to be specifically enforceable, not, however, by reference to the Federal Arbitration Act, but to § 301 of the Taft-Hartley Act. In the Court's view, § 301

commissioned a uniform federal common law of the collective agreement fashioned by the judiciary out of national labor policy and limited only by judicial "inventiveness." *Id.* at 457. Three years later, in the *Steelworkers Trilogy*, the Court acknowledged labor arbitration as an integral element of the autonomous system of self-government created by the collective bargaining relationship. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of American v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Court stressed that, unlike the commercial context, where arbitration is a substitute for litigation, in the collective bargaining context labor arbitration substitutes for the strike.

Not surprisingly, because a collective agreement bears scant similarity to a commercial contract or even a contract of employment, the legal nature of the collective agreement proved challenging. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944) (distinguishing the collective bargaining agreement from a "contract of employment"). Scholars differed deeply over whether the collective agreement conferred any individual rights on the employees governed by it at all, or whether the collective agreement was a set of rules and practices that governed the workplace the only legally enforceable aspect of which being an obligation to arbitrate those disputes that the union chose to press. *Compare* Clyde Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1972), *with* David Feller, *The General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663 (1973).

In fashioning the federal common law of the collective agreement, the Court accommodated the union's crucial role in the system of industrial collective self-government even as it countenanced the possibility of an accrual of individual contractual rights: the individual employee had first to attempt to exhaust the grievance-arbitration procedure, *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), and could thereafter sue the employer for an alleged breach of contractual rights *only* if she could prove that the union had breached its duty of fair representation either in declining to take her case to arbitration, *Vaca v. Sipes*, 386 U.S. 171 (1967), or in its presentation of the claim in arbitration, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). That the contractual claim was in fact meritorious is not dispositive of whether the union breached its duty of fair representation in declining to bring it before an arbitrator, *Vaca v. Sipes*, *supra*, at 192–93, such being the union's crucial role in the system.

By the early 70s, however, the legal landscape on which the system of collective bargaining plays out had changed. An expanding number of individual workplace rights were being legislated, especially in statutes prohibiting employment discrimination. How these laws related to the autonomous system of collective bargaining and grievance arbitration was addressed in *Alexander v. Gardner-Denver Co.*, *supra*. The decision need not be rehearsed. It is enough to say that the Court saw two quite different legal regimes at work: the collective agreement policed by the union through the grievance procedure; and positive law policed via litigation in the courts. Where the collective agreement also committed the parties to observe principles of

non-discrimination as a contractual obligation, the union's resort to labor arbitration was not preclusive of the individual's resort to the courts: "Both rights have legally independent origins and are equally available to the aggrieved employee." *Gardner-Denver*, *supra*, at 52.

The *Gardner-Denver* Court addressed the argument that the union had waived the individual employee's access to Title VII and rejected it in part—but only in part—on the ground that statutory rights may not be submitted to private arbitration for final disposition, *id.* at 51–52, citing *Wilko v. Swan*, 346 U.S. 427 (1953). Inasmuch as *Wilko* was overruled in 1989, were it the sole basis of decision, the "tension" adverted to at the outset of this Introductory would be well placed. But there was a good deal more at work in *Gardner-Denver* than *Wilko*'s now discarded notion that law can be decided only by a court. Just as the Court had in the *Trilogy*, the *Gardner-Denver* Court dwelt on the system of self-government created by collective bargaining, *id.* at 52–53, not only on the labor arbitrator's role in that system, *id.*, but, even more importantly, on the union's role. The Court was skeptical that the autonomous system of industrial self-government could be expected to vindicate individual statutory rights, a skepticism grounded in

> the union's exclusive control over the manner and extent to which an individual grievance is presented. . . . In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. . . . Moreover, harmony of interest between the union and the

> individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . And a breach of the union's duty of fair representation may prove difficult to establish.

Id. at 58 (citations omitted).

Over the course of the past decade and a half, employer resort to individual contracts of adhesion to sweep statutory civil rights into employer-promulgated arbitration systems has grown apace. Alexander Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 405, 408–12 (2007). As a result, for many non-unionized employees the judicial track for the vindication of civil rights claims has been substituted for by an arbitral track; but that substitution works no change in the bases upon which *Gardner-Denver* rests. Now, as then, there are two very different regimes:

On the one hand is *employment arbitration.* This is conducted under an individual contract, for the most part addressed by the Federal Arbitration Act governing an individual "transaction involving commerce," 9 U.S.C. § 2, the enforceability of which is determined by state law, *id.*, under which the individual has resort to an arbitrator commonly selected from a special panel of employment arbitrators most often trained in law, Jacquelin Drucker, *The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 345, 355 (2007), subject to procedures that, as a substitute for litigation, customarily include pre-trial discovery, *e.g.*, American Arbitration Association, National

Rules for Resolution of Employment Disputes, Rule 9 (July 1, 2006), in which proceeding the employee has a right to representation by counsel—the individual employee being the client to whom professional responsibility is owed—*id.*, Rule 19, in which the burdens of proof, often a key element in civil rights litigation, are those the respective parties would bear under the applicable civil rights statute, *id.*, Rule 28, and out of which the full range of statutory relief is expected to be afforded.

On the other is *labor arbitration*. This is the product of a collective agreement—a system of on-going collective self-government, not an individual "transaction," in which access to and the conduct of the arbitration is controlled by the union, not the individual, the enforceability of which is governed by a uniform federal common law of the collective agreement under § 301, not by the FAA or state law, in which claims are heard by persons commonly selected from a special panel of labor arbitrators designated as such, often persons not legally trained, Joseph Krislov, *Entry and Acceptability in the Arbitration Profession: A Long Way to Go*, *in* LABOR ARBITRATION IN AMERICA: THE PROFESSION IN PRACTICE ch. 4 (Mario Bognanno & Charles Coleman eds., 1992) (almost 40% of labor arbitrators are trained in industrial relations, not law), subject to procedures that, grounded in industrial relations, do not include pre-trial discovery, THE COMMON LAW OF THE WORKPLACE, *supra*, at § 1.13, in which a legal representative's professional obligation (*if* there is legal representation) runs to the client union, not to the grievant employee, in which burdens of proof, as a matter of industrial relations, rarely play a role, *id.* § 1.92, at p. 54, and out of which the labor arbitrator

is expected to award only such relief as the collective agreement contemplates, *id.* § 10.1.

It is true that both employment arbitration and labor arbitration are called "arbitration." But just as hounds and greyhounds, mongrels and spaniels are all called dogs, *Macbeth*, Act III, scene 1, they're not the same animal.

Consequently, the skepticism the Court expressed in *Gardner-Denver* for the suitability of submitting statutory claims to preclusive resort to a collective agreement's grievance procedure persists—and rightly. The question is not whether employment arbitrators may be deputed by contracts of employment to vindicate statutory civil rights in lieu of the courts. The question is whether the vindication of these rights can be mapped on to the system of collective self-government in which labor arbitration is embedded.

I. A COLLECTIVE AGREEMENT MAY NOT RELEGATE THE VINDICATION OF INDIVIDUAL STATUTORY CIVIL RIGHTS EXCLUSIVELY TO ITS GRIEVANCE PROCEDURE

The question before the Court is *not* whether to give judicially preclusive effect to an agreement that allows an employee to arbitrate his ADEA claim, for that is not what this collective agreement does.[5] The question is whether to give preclusive effect to the submission of ADEA claims "solely and exclusively" to the collective agreement's grievance procedure. The potential end point of that procedure is arbitration; but the union may decline to proceed to

[5] *See supra* note 2.

arbitration, just as it did here. The union's discretion in making that decision is constrained by a duty of fair representation. But adherence to the duty of fair representation is simply no substitute for a hearing on the merits of the claim.

The standards of fair representation are "highly deferential" to the union. *Airline Pilots v. O'Neill*, 499 U.S. 65, 78 (1991). *See generally* ROBERT GORMAN & MATTHEW FINKIN, BASIC TEXT ON LABOR LAW ch. 30 (2d ed. 2004). Crudely, the union may not decline to pursue a grievance out of malice, hostility, discrimination, or bad faith; nor, less crudely, may it "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Vaca v. Sipes*, *supra*, at 191. Before *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990), the courts were at 6s and 7s on how restrictive the test of "perfunctoriness" was. But in *Rawson* the Court resolved that question categorically:

> This duty of fair representation is of major importance, but a breach occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discretionary, or in bad faith." [citing *Vaca v. Sipes, supra*] The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, *and we endorse that view today*.

Id. at 372–73 (italics added).

Thus, the union's refusal to take an employee's grievance to arbitration is wrongful "only if it can be fairly characterized as so far outside a 'wide range of

reasonableness' that it is wholly irrational or 'arbitrary'." *Airline Pilots v. O'Neill*, *supra*, at 78. A union has "room to make discretionary decisions and choices, even if those judgments are ultimately wrong." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45–46 (1998). For that reason, even success on the merits of the violation, in a hybrid § 301 suit against the employer, does not alone sustain a breach of the duty of fair representation. *Vaca v. Sipes*, *supra*, at 192–93. As a leading treatise puts it:

> If the union has investigated the case and considered the merits, its refusal to proceed even on the ground that, however "arguable," it was unlikely to prevail before an arbitrator —or even that the outcome was less than encouraging—puts an end to the claim.

GORMAN & FINKIN, BASIC TEXT ON LABOR LAW, *supra*, at 1006 (citing authority). So long as honestly arrived at, a union is free to make a mistaken, flawed, or negligent judgment of whether to proceed to arbitration, of what issues to present if it does proceed or what arguments to make. *E.g.*, *Pease v. Production Workers Union*, 386 F.3d 819 (7th Cir. 2004). As Judge Easterbrook put it, with only a touch of hyperbole, federal labor law expects disputes about the application of collective bargaining agreements to be "resolved by the affected parties over the bargaining table, or by arbitrators knowledgeable about the business, rather than in court. That's why a hybrid contract/DFR suit does not get to first base unless the worker shows that the union has abandoned him to the wolves." *Id.* at 823.

The Petitioners argue that in "today's integrated workforce and diverse unions" the potential of unions

intentionally refusing to arbitrate "meritorious discrimination" claims should be discounted. Brief for the Petitioners at 44. That is quite correct, but beside the point. A union's erroneous judgment, doubt, or uncertainty that a violation of a civil right could be proved, arrived at honestly but mistakenly, no matter how well-intentioned, is no substitute for an adjudication of whether an employee's civil rights were actually violated. However well versed the union is in the bargaining history of the collective agreement, however enmeshed in the application of the collective agreement over time giving rise to an accretion of shared meaning and expectation, to the "common law of the shop," that shapes the union's decisions on what contractual grievances to pursue, the union's judgment on whether a statute has been violated is, to say the least, in no way similarly informed.

Although some union locals may follow a grievance screening process that can be trial-like in rigor, LEONARD SAYLES & GEORGE STRAUSS, THE LOCAL UNION 44–45 (2d ed. 1967) (still the authoritative study), such internal procedures are not legally mandated; and pressure from the rank-and-file, one way or another, is part-and-parcel of the grievance screening process, often including voting by the union membership on whether to pursue a grievance to arbitration. *Id.* at 104–05; *e.g.*, *Lee v. Cytec Indus. Inc.*, 460 F.3d 673, 677 (5th Cir. 2006) (pursuant to the union's rules, the failure of the grievant to self-process his grievance to an authorizing vote of the union membership bars his claim). In other words, the duty of fair representation simply cannot be "divorced from the bargaining process," Matthew Finkin, *The Limits of*

Majority Rule in Collective Bargaining, 64 MINN. L. REV. 183, 237 (1980), which is why the Court refused to draw a distinction between contract bargaining and grievance processing in the standards of fair representation. *Airline Pilots Ass'n v. O'Neill*, *supra*. Simply put: a union would not breach its duty of fair representation if it declines to take the grievance to arbitration because it believes that aggressively advocating a merely arguable or colorable discrimination claim would jeopardize its strategic relationship to the company, *cf. infra* note 7, or because more pressing contractual claims have a higher priority on the allocation of the limited resources the local has available for arbitration.

These are just the kind of judgments the collective's majority and local officers must make. Indeed, the embeddedness of grievance processing in the collective bargaining process, which played so influential a role in *Gardner-Denver*, is placed in stark relief in this case. The grievants' age claim presented two alternative ADEA theories: that the subcontract that caused their reassignment was let by their employer to effect that very end, *i.e.*, because of their age—a disparate treatment theory; or, that irrespective of motive, the decision to subcontract had an age-discriminatory effect and so required proof of reasonable business justification—a disparate impact claim. Note that both theories hinge on the decision to subcontract. But under Art. 54 of the collective agreement, subcontracting of bargaining unit work is absolutely prohibited: management's decision to subcontract could not be made without the union's agreement or acquiescence. Thus, the union's assertion of the employee's ADEA claim in arbitration would, of necessity, challenge its

own decision, either directly or consequentially, to allow the subcontract.

The union could have made the decision to permit the subcontract in utmost good faith, honestly, without hostile discrimination or intent to violate the ADEA, but unaware of the disparate impact on these employees. It could accordingly decline to pursue the age claim on an honest but arguably mistaken belief that its decision did not abet the company's alleged discriminatory act. Were *Gardner-Denver* to be abandoned, a union's honest if mistaken and possibly negligent belief in the propriety of management's decision would mean that affected employees would be denied any forum for the vindication of their civil rights.

From a larger perspective, it is understandable that a company would want civil rights claims to be subsumed into the grievance-arbitration procedure of the collective agreement: not only is the prospect of civil litigation ending in a jury trial foreclosed, but the company would bear no liability for wrongful discriminatory conduct if the union does not breach the duty of fair representation in declining to take the claim to arbitration; and, inasmuch as the standard of fair representation is in practice so highly deferential to the union, Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFFALO L. REV. 89 (1985), in practical terms the company's potential exposure would be much reduced and, in some instances, entirely eliminated. Even if the union does fall afoul of the duty in not arbitrating the claim, thereby allowing the lawsuit against the employer to proceed, the union would bear a significant share of any resulting liability. *Bowen v. U.S. Postal Service*, 451 U.S. 212 (1983).

Consequently, the employer would clearly benefit by shifting these risks on to the union; but, concomitantly, a union would be most unlikely to assume the risks of becoming the sole guarantor of the employees' statutory civil rights unless some *quid pro quo* made it worth the union's while. The Petitioner asserts as much here: "[T]he Union gained sizeable wage and benefits enhancements, as well as other favorable provisions, in exchange for its agreement to arbitrate its members' statutory employment claims." Brief for the Petitioners at 6; *id.* at 14 ("It is appropriate for a union to bargain collectively over the method of resolving such claims in exchange for valuable concessions, as occurred here.").

That would have to be the basis of the bargain, and it should be of no effect: an individual's civil rights should be no more disposable by a majority's will—by subsuming them exclusively into the grievance process the majority controls—than they are dispensable by a majority's will, by deciding on a case-by-case basis whose civil rights to vindicate.[6] This is not because the majority might be hostile to the claim or even indifferent to it, but because, even

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[6] The Petitioners advert to the fact that rights granted by the Labor Act to further the process of collective bargaining may be relinquished by collective agreement. Brief for the Petitioners at 23–24. However, that says nothing about those individual civil rights that are insulated from majoritarian control; and, it should be noted, even some statutory rights that inhere in the system of collective representation are insulated from majoritarian dispensation. Matthew Finkin, *The Limits of Majority Rule in Collective Bargaining*, *supra*, at 190–91 (observing that not only "external law" but certain aspects of the Labor Act "are insulated from disposition by a majority," and discussing *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974)).

if the grievance is investigated with painstaking care and in utmost good faith, other concerns relevant to the union's role in collective bargaining may persuade it against pressing the grievance to arbitration.

II. *GARDNER-DENVER* PLACES NO BURDEN ON EMPLOYERS

Rather early on, critics of *Gardner-Denver* thought it gave unionized employees "two bites on the apple" of civil rights protection. This was addressed in the still leading study by Michele Hoyman and Lamont Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, 39 ARB. J. 45, 57 (Sept. 1984), more on which below. The "two bites" criticism has recurred in the wake of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); that is, because non-unionized employers may adopt employment arbitration for the definitive disposition of their employees' civil rights claims while unionized employers may not sweep those claims into labor arbitration for definitive disposition, the maintenance of two distinct tracks for the protection of civil rights in the latter employments is perceived to be burdensome to unionized employers, if only in comparison.

It is true that non-unionized employers have sought employment arbitration because they see it as more advantageous to them than civil litigation: the process is swift, informal, inexpensive, and of low visibility. As the Petitioners quite rightly argue, these advantages are also accommodated in the unionized workplace where contractual discrimination claims can be conjoined with other contractual claims and both might be resolved satisfactorily in a single proceeding. Brief for the Petitioners at 26–30. But

none of these advantages requires that preclusive effect be given to the decisions of labor arbitrators when treating statutory civil rights. Let us look more closely at how the system actually works.

Under *Gardner-Denver* and *Vaca v. Sipes*, a union is free to select those grievances it will take up through the grievance procedure. If it chooses not to pursue a discrimination claim to arbitration the grievant is free to pursue her claim in court. But if it does choose to take it up, the process can be swift (subject, as here, to a contractual statute of limitations), informal (a series of steps is commonly provided, as here, in which the facts and circumstances can be aired), costless to the grievant, of low public visibility, and, for contractual purposes, final; but only those intractable cases about which the union is strongly motivated will actually go to arbitration.[7]

If the union prevails in arbitration on the contractual discrimination claim the matter would be at an end, assuming an effective remedy is afforded the grievant. If the union does not prevail, the

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[7] The substitution of employment arbitration for the courts is premised on the assumption that employees are all too often unable to secure legal representation where "the stakes are too small and outcomes too uncertain." Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. DISP. RES. 559, 563 (2001). But it is in just that category of case—where the outcomes are most uncertain—that the duty of fair representation is most deferential to union refusals to proceed to arbitration. Section I, *supra*. Thus, the relegation of these employees to the exclusive resort to the union would be antithetical to the fundamental policy assumption of employment arbitration, which is to make it possible for just those kinds of claims actually to be heard.

individual grievant may avail herself of legal relief de novo, though the arbitration decision can be given weight as evidence in the later civil proceeding. *Gardner-Denver Co.*, *supra*, at 60 n.21. For that employee the system functions as, in effect, one of advisory arbitration. Akin to some other pre-trial alternative dispute resolution devices, such as "mini trials," the employee (and her lawyer) secures a sense of how a neutral adjudicator would assess the strength of her claim and is in a better position to judge whether further legal recourse de novo would be worth the candle.

The leading study on how the dual track system actually works surveyed practitioners for case disposition in the immediate period after *Gardner-Denver*, 1974–1981; there has been no more recent research. In this study's sample, 1,761 grievances involving employment discrimination had been arbitrated under collective agreements. Of these, 307 (17%) were relitigated; 21 of these (6.8%) resulted in judgments that differed from the arbitral disposition. Michele Hoyman & Lamont Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, *supra.* In other words, in the vast majority of cases (83%) the employee either prevailed in arbitration or, having lost, decided against relitigating the claim. Though diligent research has revealed no more recent data, *amicus* NAA has no reason to believe the relitigation rate has significantly increased; in fact, the very want of research interest suggests the absence of a pressing problem. It is most plausible that, the more experience lawyers have had since 1984, the more employees are likely to be counseled of the unlikelihood that they will be successful contrary to

the labor arbitrator's disposition and the less likely will the employee be to incur the costs of further judicial resort. Indeed, the Court's allowance of the arbitration award into evidence in such a case serves as just such a sobering caution. *Gardner-Denver*, *supra*, at 60 n.21.

Consequently, de novo litigation would be availed of under *Gardner-Denver* only by those relatively few unionized employees who believe so strongly that their civil rights had been violated that they are willing to incur the costs of securing legal counsel to pursue that resort despite an arbitral determination to the contrary. The 7% who relitigate and succeed in court contrary to the labor arbitration, while scarcely enough to encourage de novo litigation, is not an insignificant figure from the perspective of vindicating civil rights. But, more important, under *Gardner-Denver* judicial resort remains available to those unionized employees whose claims are not pursued by their unions to arbitration without breach of the duty of fair representation.

Amicus NAA submits that this state of affairs is scarcely unduly burdensome to employers:[8] in the

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[8] Petitioners argue that unless preclusive effect is given unionized employers will "cut unions out of the process" by exercising their "well established" right to impose employment arbitration unilaterally. Brief for the Petitioners at 32, citing the only decision on point thus far, arising under the Railway Labor Act, not the National Labor Relations Act, *see Air Line Pilots' Ass'n Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999). Two observations should suffice. First, a solitary decision on a novel proposition does make the law "well established." In fact, the National Labor Relations Board has yet to pass on the question the analysis of which is actually rather complicated. GORMAN & FINKIN, BASIC TEXT ON LABOR LAW, *supra*, at § 21.9. Second, and closely related, the fact that

case of employees whose claims are not resolved to their satisfaction in arbitration, the "second bite," if such it be—*see* Conclusion, *infra*—is infrequently taken; but when it is employees prevail to a small but not insignificant extent. In the case of employees whose claims have not been taken to arbitration, there will have been no "first bite" to begin with.

As the Petitioners candidly recognize, were *Gardner-Denver* to be abandoned, the only recourse for employees whose claims were not arbitrated is either: (1) to persuade the Equal Employment Opportunity Commission (EEOC) to litigate on their behalf, Brief for the Petitioners at 43; or (2) to bring § 301 hybrid claims that condition the vindication of the civil right on the employee's success in a claim of breach of the duty of fair representation, *id.* at 42–43. The EEOC would not be expected routinely to litigate on behalf of every discriminatee who fails to persuade her union to take her case. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002). Nor, in view of the high degree of deference given unions, Section I, *supra*, would we expect a significant number of employees to prevail in § 301 suits, no matter how meritorious the statutory claim turns out to be, for want of breach of the duty of fair representation.

In practical effect, employees whose civil rights claims are not arbitrated have scant recourse. In that sense, the Petitioners are clearly correct: as to those whose civil rights are not arbitrated, the law,

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there has been only one litigated instance of this occurring indicates that unionized employers have encountered no great burden as a result of *Gardner-Denver*'s continuing vitality; they have seen no need to take that action in the decade and a half since *Gilmer*.

as they would have it, would be less burdensome to employers. But it is equally clear that the law would be commensurately less protective of civil rights.

CONCLUSION

Today, as in 1974, we have two separate systems, differently derived and differently administered, that create and vindicate rights in the unionized workplace—external law and collective self-government. To borrow from *amicus* NAA's brief to this Court in *Wright v. Universal Maritime Service Corp.*, *supra*, unionized workers do not have "two bites" at the workplace rights apple, they have two different apples. That is scarcely anomalous; indeed, this Court has recently reemphasized *Gardner-Denver*'s observation that employment discrimination legislation has "'long evinced a general intent to accord parallel or overlapping remedies.'" *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (quoting *Gardner-Denver*, *supra*, at 47). These separate systems have worked well in tandem for more than thirty years. In *amicus* NAA's judgment, it would disrupt the system of industrial self-government—and do damage to the vindication of civil rights—to conflate them.

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